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No. 88-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et. al.*,
Respondents.

REPLY BRIEF OF PETITIONERS

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ERRATA

The cite to the Clean Water Act in the Table of Authorities should read: Clean Water Act § 404, 33 U.S.C. § 1344

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Petitioners ("Pyramid") offer the following points in reply to the Brief for the Federal Respondents in Opposition ("Govt. Br.").

This case raises an issue of fundamental importance to the administration of the Section 404 program. If this Petition merely involved a "fact bound" determination affecting only one developer, Govt. Br. at 10, thirteen *amici* representing diverse interests not ordinarily aligned together would not be urging the Court to hear it. Likewise, thirteen opposing organizations would not be standing like Horatio at the bridge attempting to shield the decision from review. Plainly, all sides understand the sweeping precedential effect of the Second Circuit's opinion.

That decision both works a radical change in the "test" applied by the Corps of Engineers to all 404 permit applicants[1] and hands EPA far broader authority than Congress ever intended. The Second Circuit not only found EPA's "market entry" theory to be reasonable, it held that the theory was the *only* method for determining the availability of alternatives under the practicable alternatives requirement.[2] Pet. App. 17a. Furthermore, the court refused Pyramid's entreaties to require the Agency to define market entry, asserting that "it would confuse things further to attempt to do so." *Id.* at 22a. As a consequence, no one knows when a party "enters the market," and EPA is free to change the date with each new case.

"Market entry" is the key issue in this case. It is remarkable that after three years of litigation in which "market entry" has been the central issue, the Government now claims that "the 'market entry' standard is simply not presented in this case." Govt. Br. at 10. According to the Government, EPA's

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[1]The Government's suggestion that the decision is of no moment because "EPA ha[s] employed its Section 404(c) authority only five times," Govt. Br. at 13, is wrong on two counts: first, the practicable alternatives test which is substantially altered by this decision is applied in every permitting decision (approximately 14,000 per year) not merely in Section 404(c) veto actions; and second, EPA has stepped up its use of Section 404(c) since the decision in this case. In February 1989 alone, for example, EPA Region I initiated veto proceedings against a state-sponsored water reservoir project in Rhode Island, 54 Fed. Reg. 5133 (Feb. 1, 1989), and two weeks later, headquarters published a Final Determination vetoing another project in Georgia, 54 Fed. Reg. 6749 (Feb. 15, 1989).

[2]Since the Second Circuit opinion was not based on deference to EPA, Pet. App. 20a, the Government has misstated the "Question Presented." This is not a simple abuse-of-discretion case, but one which tests whether EPA's "market entry" theory violates the language and purpose of the statute and regulations and offends fundamental principles of administrative law.

decision in this case turned on "the uncontested fact . . . that Pyramid never checked the availability of the North Attleboro site." Govt. Br. at 10. But the consequence of not checking is not permit denial, Pet. App. 92a-95a, and EPA did not veto this permit because Pyramid failed to check. It vetoed the permit because, according to the Government, North Attleboro was available when Pyramid "entered the market." Pet. App. 92a-95a. Clearly, the act that constituted market entry and when it occurred are critical to the EPA and court decisions in this case.

If Pyramid did not "check" in a manner that would have suited EPA's fancy, this was because Pyramid judged the site to be infeasible[3] and knew that it was controlled by a competing mall developer. Moreover, under the regulatory interpretation espoused by both the Corps and EPA regional offices at the time Pyramid purchased South Attleboro, "checking" would have done it no good.

Initially, both regional offices believed that, under the practicable alternatives test, an alternative would be deemed "available" to the applicant if it was available to anyone. *See* J.A. 156-159, AR B-101, H-92. Since Pyramid knew that New England Development had already acquired controlling options on North Attleboro intending to develop a shopping mall, it knew the Corps considered the site available to Pyramid as a matter of law, even though it was not available in fact. Therefore, Pyramid's permit application focused primarily on establishing the infeasibility of North Attleboro and dealt with the site's nonavailability only in passing.

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[3]The regulations forbid permit issuance if the applicant has a "practicable alternative." An alternative must be both "feasible" and "available" to be deemed "practicable." If an alternative is either infeasible or unavailable, it cannot be practicable. 40 C.F.R. § 230.10(a).

EPA headquarters, in reviewing this case, ultimately corrected the Region's legal error concerning availability, recognizing that a site is "unavailable" if it is not available to the applicant. Pet. App. 92a. The Government now seeks to have its own errors held against Pyramid, bringing Pyramid's conduct rather than the actual availability of an alternative site into question.

Pyramid never advocated a market entry theory of availability. The Government's arguments that it did are, charitably, disingenuous. As the Government knows full well, and, indeed, acknowledged in its brief below, the statement it cites from Pyramid's permit application referred only to the feasibility of an alternative, not the availability.[4] The "feasibility" inquiry is separate from the "availability" inquiry, and there is no reason the two must be judged at the same point in time.[5] If the Government means to suggest that feasibility and availability must be judged in the same time frame,[6] then the Government itself is inconsistent, for the Corps and EPA rejected Pyramid's argument on the timing of the feasibility analysis. They applied a present-tense analysis of feasibility, and judged feasibility on the basis of conditions existing as of the date of the permit decision, but judged availability as of "market entry."

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[4]Pyramid's application addressed the "availability" prong of the practicable alternatives test in a separate section and did not discuss the timing question that is the focus of this litigation.

[5]Feasibility is a judgment call and, thus, Pyramid argued that the Corps should look at feasibility as of the time and in the circumstances in which the applicant had to make its judgment. The same is not true of availability, which is a simple factual question — *i.e.*, is a site available or not?

[6]If the two must be judged in the same time frame, then "the most natural reading" is the time of application, since the regulation is written in the present tense and is intended to be applied by the permitting authority in deciding on applications. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, ____ U.S. ____, 108 S.Ct. 376, 381 (1987).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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